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ABSTRACT

During the last two decades, there has been a great increase in the use of litigation by social reform groups. This activity has been stimulated by the hospitality of the courts to the demands of social reform groups and the availability of subsidized young, activist lawyers. The paper examines the uses of the legal system by social reform groups and the problems that groups have in enforcing changes in legal rules. Three types of litigation strategy are discussed: (1) defensive, where the group, its leaders, or its members are being prosecuted; (2) subsidiary, where litigation is used in aid of other strategies; and (3) affirmative, to accomplish the primary objectives of the group. Most problems occur in implementing affirmative litigation. Four types of enforcement problems are analyzed: (1) Enforcement involves massive lower-level official discretionary decisions; (2) Enforcement involves massive private discretionary decisions; (3) Enforcement involves continuous inputs at key regulatory agencies; and (4) Enforcement is countered by a strong recalcitrant government defendant. The paper concludes by explaining the empirical results in terms of recent behavioral theories of social reform groups.

SOCIAL REFORM GROUPS AND THE LEGAL SYSTEM: ENFORCEMENT PROBLEMS

Joel F. Handler

Social scientists have conflicting views about the efficacy of social reform groups in American political life. McCarthy and Zald think that changed structural conditions such as the societal increase in affluence, the growth of student and professional populations, and the use of the media have contributed to a massive expansion of social reform groups during the last decade.[1] Theodore Lowi agrees that there has been a rise in social reform activity, but he ascribes a different reason; he thinks that it is the decay and failure of existing institutions in American society that is producing a new surge of reform movement activity.[2] Lowi, and others, however, are pessimistic about the efficacy of this activity in bringing about meaningful social change.[3] Mancur Olson, Jr., on the basis of economic theory, argues that large social reform groups are inherently weak and unable to counter the political power of smaller, special interest groups.[4]

Questions of efficacy ultimately reduce to an empirical question -- the extent to which social reform groups can mobilize and effectively use resources. During the past two decades, social reform groups have increasingly turned to the legal system, and particularly litigation, as a resource. On behalf of social reform groups, lawyers won cases that received a great deal of publicity. The media portrayed Ralph Nader, civil rights lawyers, environmentalists, and OEO legal services lawyers as powerful instruments of social change. This image was enhanced by the political attacks of their opposition, which also received a lot of publicity. Changes in the law seemed to accomplish the goals of social reform groups and, in addition, to act as powerful symbolic rewards enabling social reform groups to attract outside resources. If social reform

groups can successfully use the legal system, it is possible that the new uses of the judicial branch of government may have revitalized the pluralist model of American society by providing an effective forum for those groups who cannot persuade the other branches of government to act on their behalf. On the other hand, perhaps the legal system has become too readily available. The sympathetic response of the legal system may lend credence and legitimacy to demands that either do not reflect genuine grievances or to social reform groups that lack the membership resources to take advantage of the opportunities that the law has given them.

This paper will examine some of the theoretical problems in the use of the legal system by social reform groups. Of particular importance will be the problems of enforcing legal rules. It is a commonplace error to assume that a change in the law produces a change in society; perhaps the publicity given to the court and legislative victories of social reform groups creates this impression. Yet, social reform groups have special difficulties in implementing particular kinds of legal victories.

First, we will trace briefly how the legal system opened its doors to social reform groups. Then, we will set forth in some detail the kinds of uses of the legal system made by social reform groups. The case studies are selected to illustrate particular problems and issues; they are not representative of the range of social reform group activity. In the final section of the paper, we will explain the experience of social reform groups with the legal system in terms of behavioral science theories of groups. The theoretical and empirical considerations will shed light on the efficacy of the legal system as a resource for social reform groups.

1. Opening up of the Legal System

Although throughout American history social reform groups have turned to litigation to accomplish their goals,[5] a number of factors in the past two decades have made the judiciary increasingly hospitable to the demands of social reform groups. First, and foremost, was the philosophy and activism of the United States Supreme Court under the stewardship of Chief Justice Earl Warren.[6] For our purposes, the significant innovation of the Warren Court was to make available the federal judiciary to the claims of minorities and oppressed groups. As the Court saw it, " . . . [U]nder the conditions of modern government, litigation may be the sole practicable avenue open to a minority to petition for redress of grievances."[7] In a variety of ways, the Court opened this avenue for social reform groups.

The starting point was Brown v. Board of Education (1954),[8] which although technically confined to a single field (school desegregation), set in motion all of the major elements of the activism of the Warren Court. The Brown decision itself was part of a long struggle on the part of civil rights groups; thus the Court was operating in an area where social reform groups were already active and seemingly capable of seizing the opportunity presented by the Court. The Brown decision and the civil rights struggle of the 1950s established the model for social reform activity through law.

One element of this activist model was the propensity of the Warren Court to decide against government.[9] The Court was willing to move against the state government from two directions. It applied much of the Bill of Rights to restrict state conduct, and in addition, it expanded federal power at the expense of state power. Areas formerly considered to be of "local" concern included schools, criminal justice administration, hospitals, welfare, apportionment, and voting, among others. Another element was reflected in the quote,

above, where the Court viewed itself as an appropriate forum for groups that felt that they could not get a sufficient hearing from other branches of government. Baker v. Carr[10] (the voting apportionment case) and the erosion of the "political question" doctrine illustrated the Court's willingness to exercise its discretion on behalf of groups who could not get redress from the legislative or executive branches of government.[11]

In order to make the federal courts more accessible, the Court had to recast the traditional barriers to access -- standing, jurisdiction, and the "case or controversy" doctrine. The standing requirement, which prior to the Warren Court was a significant barrier to plaintiffs who could not show a pecuniary interest in the litigation, was substantially reduced.[12] The Court also modified that part of the standing requirement which prevented plaintiffs from asserting the rights of third parties; thus, the NAACP had standing to assert the constitutional rights of its members who were fearful of pressing their claims.[13] The Court also increased access by relaxing the requirement of ripeness. Previously, in order for a case to be sufficiently developed for judicial determination, the plaintiff had to show either a past injury or an imminent threat of injury. The Warren Court relaxed this doctrine when the effects of laws or administrative practices, with or without the threat of enforcement, would have a "chilling effect" on non-market behavior.[14] A final attribute of the Court's activism was its willingness to issue affirmative commands and have the federal judiciary supervise the administration of these commands. The federal courts, from time to time, became managers of school systems and political districting.

In addition to increasing access, the Warren Court expanded the protection of substantive rights for its new clients. It expanded the concept of state action subject to review by the federal judiciary and the equal protection

clause of the Fifth and Fourteenth Amendments. The Brown decision, which declared separate but equal educational facilities to violate equal protection, was relied upon to invalidate segregation in buses, golf courses, bathhouses, courtrooms, voting, marriage, public accommodations, housing, as well as other activities of state action. As part of the new equal protection doctrine, the Court developed the concept of "fundamental interests" which meant that where such interests were found to be impaired by a legal classification, then the normal presumption of constitutionality would be reversed and the burden would fall upon the state to justify the classification.[15] An important adjunct of this principle was that laws which on their face made no distinctions, could still be held violative of the equal protection clause, if they operate unequally and impaired a fundamental interest. For example, if a state allowed an appeal from a criminal conviction, then it had an affirmative duty to provide sufficient resources so that indigents could prosecute appeals. The Court classified as fundamental interests voting, First Amendment freedoms, education, marriage and procreation, interstate travel, and due process rights in criminal procedure. Although the Court never spelled out why certain interests were fundamental and others were not, it seemed to stress those interests which went to the ability of people to participate in the political process and to live with minimal standards of social decency.

In addition to the equal protection clause, the Court also expanded the due process clause of the Fifth and Fourteenth Amendments. It abandoned the arbitrary civil-criminal distinction and extended the due process clause to situations where physical constraint was the fact (e.g., detention in a juvenile home) regardless of the label.[16] Similarly, it expanded the term "property" to include the interest of a person in his job, in public housing, in welfare benefits, in public education, and in the use of public facilities.[17] In the

Court's view, the benefits provided by government were of such importance to the person and allow for such control over the lives of the citizens, that restraints must be placed on the administration of this largess.[18]

Along with the expansion of the equal protection clause, the Court also expanded "substantive" due process by developing ideas of "preferred freedoms."[19] If the Court found that such a freedom was infringed, then the state had the burden of demonstrating a compelling state interest in justifying the restriction. Generally speaking, these protected freedoms fell into two broad categories. First were those which safeguarded the integrity of the democratic process; freedom of speech, association, assembly, and the press.[20] One commentator explained the Court's justification in making these distinctions in the following terms: "Economic interests are typically represented in the legislative bodies -- or able to obtain a hearing from them. Despised ideologies are not."[21] The second category dealt with the freedoms of citizens apart from their participation in the political process: freedom of religion, freedom of speech in the obscenity area, freedom to travel, the right of privacy in the marital area, as well as other areas of privacy.[22]

In a wide variety of ways, under the Warren Court, the federal judiciary heard the claims of the deviant, the oppressed, and the unrepresented. The Court's basic position was to provide a sympathetic forum to those who were without representation elsewhere in the political system. For this reason, the federal judiciary in the post Brown era was especially inviting to growing social reform groups.

Lawsuits require lawyers. Acceptance of the invitation extended by the Warren Court was made possible by a series of changes in the recruitment of young lawyers away from traditional law practice into activities on behalf of social reform groups.[23] The first major change was part of the civil rights

struggle seeking to implement the Brown decision and its progeny. The Brown decision and the desegregation phase of the civil rights movement had a tremendous influence in recruiting northern white young liberal lawyers. The Supreme Court pointed the way (at that time) to the legal road to social change for blacks. When the black struggle changed tactics to direct action in the form of massive peaceful protest, there was a great need for lawyers to defend sit-ins, freedom riders, and voter registration workers. Hundreds were drawn into the movement. For example, in 1964, 400 law students and young lawyers went to Mississippi to defend civil rights workers. Out of this experience grew the Law Students Civil Rights Research Council which expanded legal assistance to blacks in areas other than desegregation. The NAACP Legal Defense Fund rapidly expanded to a wide range of legal defense activities.

The perception of law as a viable strategy for social change was greatly magnified by the War on Poverty and Office of Economic Opportunity Legal Services. Legal Services was part of the Community Action Program (CAP), perhaps the most dramatic aspect of the War on Poverty. The basic idea of CAP was that groups in the communities would organize, and with government help, would help themselves. Since it was recognized that the poor suffered under the existing system of law, legal service lawyers were to help the poor help themselves. Under OEO Legal Services programs, the federal government funded a rapid expansion of energetic, young lawyers to serve the poor. A great deal of the work of these lawyers was "service" cases -- handling routine, individual matters on a case-by-case basis. But under the leadership of Clinton Bamberger and Earl Johnson, the first two national directors of Legal Services, the emphasis was placed on "law reform" or "impact litigation." This was test case litigation that would affect large classes of people. Johnson's view coincided with the predispositions of many young lawyers in the most important

offices in the country. Most of these young men, in previous years, would have worked for large law firms or government, and the practice of law for them, through education and training, meant appellate court law. Earl Johnson's arguments for the efficacy of test case litigation for social change struck a responsive chord among the legal service lawyers in the most prestigious programs. Not all of legal services turned to test case litigation; indeed, quite the opposite. The overwhelming majority of lawyering activity continued to be service cases. Still, the official position, the ideology of the times, was that social change could be accomplished through test case litigation on behalf of social reform groups.

Middle-class social reform groups were similarly encouraged. Ralph Nader, a lawyer, was a key figure in the rise of the consumer movement. He constantly stressed the role of law and lawyers on behalf of consumers and exhorted law students to work for his cause. One of his basic approaches was to protect the consumer by forcing administrative agencies to enforce the law. Similar approaches were taken by the environmentalists. Environmental protection statutes were passed at the federal and state level and environmental groups sought to have government enforce these (as well as other) laws. This is not to suggest that consumer and environmental groups always litigated. They continued to lobby and engage in political activity and public relations; but litigation rapidly evolved as an important part of their tactics.

The changes in the law of standing and of class actions were especially important to the consumers, environmentalists, and similar kinds of organizations. In one early and influential case (Scenic Hudson Preservation Committee v. Federal Power Commission),[24] in a licensing controversy concerning a hydroelectric project, the Federal Court of Appeals held that the Commission must consider aesthetic and environmental factors as well as engineering ones;

and furthermore, in order to properly consider these factors, the Commission must afford an opportunity to be heard to "those who by their activities and conduct exhibited a special interest" in the "aesthetic, conservational, and recreational aspects of power development." Another example involved television license renewals, where the court ordered that standing be recognized in "listeners" representatives; thus the court accorded standing to a plaintiff claiming to represent the class of black listeners who were allegedly discriminated against by various policies of the stations.

Class action cases were not restricted to minority, poverty, consumer, and environmental groups. Many other kinds of reform groups also used litigation. By the mid-1970s there had been a large increase in litigation by groups interested in improving the conditions of the mentally ill. By then there had also been litigation on behalf of such dependent persons as juvenile delinquents, prisoners, retarded children. Practically all of these lawsuits were class actions; the plaintiffs included not only individuals but also organizations or groups of interested people.

A "public interest bar" developed along with this rise in middle-class test case litigation. These lawyers distinguished themselves, in part, by representing groups that could not purchase adequate legal services at the market price. Most of the work was on behalf of environmentalists, consumers, and minorities. Most of these public interest lawyers were in law firms supported by charitable foundations, although some lawyers were in private practice and held themselves out as "public interest" lawyers. The public interest private practitioners tried to restrict their intake of regular cases and worked mostly for social reform groups. Other lawyers were in conventional firms but did public interest law work as a contribution to public service. On the whole, as of the mid-1970s the public interest bar was very small; for example,

in 1974 the number of lawyers in the charitable firms totaled no more than about fifty for the whole country. Yet, many of their lawsuits presented significant cases. For example, in one suit, plaintiffs prevented a powerful consortium of oil companies, the state of Alaska, and the U.S. Government from constructing an oil pipeline. It took an Act of Congress, after a two-year delay, to allow construction to begin.

During the decades of the 1950s and 1960s, combinations of forces produced an outpouring of legal rights. The courts fashioned new rights out of existing doctrines and statutes. The legislatures created new legal rights for the poor, minorities, environmentalists, and consumers. Lawyers, responding to the social reform spirit of the times, represented individuals and groups seeking to establish and secure these rights.

Here, we are concerned with the legal process activities of social reform groups. The primary focus will be on litigation since the problem we are examining is the extent to which groups can use the judiciary to press demands which are not being responded to elsewhere in government. We are using the term litigation broadly; it includes not only court cases, but also litigation in the administrative process as well as the tactics of confrontation and bargaining that precede and follow litigation.

2. The Uses of Litigation

Litigation is often only one of a number of strategic choices available to social reform groups. Moreover, litigation is often not an exclusive strategy; quite often it is used in conjunction with other tactics. In additon, tactics and choices change over time as some succeed, some fail, and changes occur both within the group and the environment within which the group operates.[25] For purposes of analysis, we will discuss three types of litigation strategy: (1)

litigation may be used defensively, where the group, its leaders, or its supporters are being sued or prosecuted; (2) litigation may be subsidiary to other strategies or goals that the organization is pursuing; and (3) litigation may be used affirmatively to accomplish the primary objectives of the group. We are using this typology as a starting point for discussion. In real life, the lines between the categories blur. The goals of social reform groups can be mixed, or ambiguous, or complex, or change in the course of litigation. The litigation strategies can change, or be used for more than one purpose.

Defensive Litigation. When members of a social reform group are prosecuted criminally, they are not the ones who initiate court action. Nevertheless, acceptance of litigation is still an alternative strategic choice; the defendants can choose to flee by going underground or into exile. If they choose to defend themselves in court, they still have alternatives in the manner, style, or purpose for which the litigation may be used. The litigation can be used strictly defensively, that is, solely to ward off attacks. Or, the criminal trial can be used for a variety of other organizational goals. In the latter situation, litigation serves two purposes -- defensively as a protective device, and as an instrument for the group's political and organizational goals.

The use of litigation solely for defensive purposes occurs where repression is so vigorous and widespread that the organization is reduced to fighting for its life by any means available. At this point, it has no resources except to fight the most basic, minimal legal battles. This occurred with the Black Panther Party when the Party adopted its "Off the Pig" strategy.[26] This phase started during 1967, about a year after the Panthers had electrified militant young blacks by displaying guns, standing up to the police, and proclaiming a self-defense program. Membership in the Party grew rapidly. In the context of the great urban unrest of that period, outsiders measured the strength of

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the Party very seriously and very apprehensively. The media and the law enforcement community painted the Panthers as extremely dangerous, if not crazy, white-haters. When, with violent rhetoric, the Panthers adopted the "off the pig" strategy, it was predictable that the police and the criminal justice system would strike back vigorously. The law was used to repress and then crush the Party. Within about a two year period, twenty-eight Panthers died, over 300 arrests were made as a result of hundreds of raids, over eighty Panthers were kept in jail for weeks and months, though eventually charges were dropped. Almost 90 percent of the charges were dropped after members made bail, but excessively high bail depleted Party funds. The Panthers spent over $200,000 in bail-bond premiums. Charles Garry, the lawyer for the Party, claimed that "in these cases, the purpose has clearly been to intimidate, to frighten, to remove from operation the activities of the Panthers, and to hope that the hysteria against the Black Panther Party would produce convictions and imprisonments."[27] During this period, the Black Panther Party fought for its life. The only purpose that litigation served was survival. The Party was seriously crippled, but it did manage to survive and begin rebuilding out of its base in Oakland, California. Defensive litigation was successful in freeing the principal spokesmen, Huey Newton and Bobby Seale. Even today, however, Newton is brought to trial repeatedly. These trials, in contrast to his first trial (discussed below), are straight criminal defenses.

The use of the criminal justice system against the Panthers was extreme, at least for this country, where a social reform group is so oppressed that it can litigate only for survival. Unions are often faced with court injunctions, arrests, and jailings. The primary purpose of the litigation by the defendants is to free the organizers to get them back into the field. But unions often seek to use the arrests, jailings, and court fights for publicity, sympathy,

and to attract outside resources. When litigation is used in this manner, it has more than one purpose. Publicity can be used to influece the court to free the defendants. On the other hand, if the defendants forego technical defenses or choose to remain in jail, then the litigation is being used for other goals of the social reform group.

Subsidiary Litigation. Social reform groups, in addition to unions, may use the crimiminal justice system for political purposes. The most prominent example, of course, is the "political trial."[28] There are many variations of what is called the political trial. Here, the term is used to identify the situation where the defendant deliberately eschews technical, legal defenses in order to use the trial as a forum within which to publicize the cause.[29] For example, during the early organizing days of the Black Panther Party, when Newton was trying to establish the rights of blacks to carry arms for self-defense against the police, he was arrested and tried for the murder of a police officer. This was Newton's first trial as the leader of the Party, and he specifically instructed his lawyer, Charles Garry, in the following terms: "If there is a conflict between a move that will further the cause politically and one that will serve Huey Newton personally, pursue the political motive. Let no tinge of racism pass unchallenged for fear the challenge will offend a juror; let nothing discriminatory about the system go unexposed even should the exposure make defense more difficult."[30] The Panthers immediately launched a Free Huey campaign, which attracted a great deal of white radical support. Newton, himself, used the trial to explain his background, the reasons for forming the Party, and what the Party stood for. Before the repression became overbearing, other Panther trials were also conducted to publicize the Party and expose corruption and racism in the criminal justice system.

Although the political trial most often centers on a single defendant or a small number of defendants, it was used on a mass basis during the civil rights struggles. Civil rights tactics began to turn away from desegregation lawsuits to direct action on a mass scale when four black college students sat-in at a Woolworth lunch counter in North Carolina in 1960. The idea spread extremely rapidly throughout the South, and the leaders of the various centers of activity formed the Student Nonviolent Coordinating Committee (SNCC), which, for a time, was a very aggressive direct action civil rights organization.[31] The emphasis of SNCC, at this time, was on love, brotherhood, an integrated society, and non-violent mass action. At first when the sit-ins were arrested, litigation was used strictly defensively to get the members out of jail as quickly as possible. Then, in the face of repeated jailings throughout the South, SNCC adopted the "jail without bail" tactic. The students remained in jail to dramatize the repression in the South, stimulate northern white sympathy, and, at the same time, lessen the problems of soaring legal and bail costs.

The use of litigation in the sit-ins, in the Freedom Rides, and in the voter education campaigns was to protect the exercise of legal rights from illegal attacks. Civil rights workers were subjected to beatings, murder, arrests, jailings, harassment, and social and economic pressure. The primary goals of the civil rights organizations were integration of various public facilities and the exercise of the franchise by blacks. Litigation was used subsidiary to these goals.

The exercise of legal rights, backed up by defensive litigation, is a method of providing benefits to build and maintain an organization. The initial recruiting tool of the Black Panther Party was exercising legal rights to carry unconcealed loaded guns in public.[32] The Panthers displayed their guns openly, announced a policy of self-defense against the police, and began citizen patrols

of the police to observe their tactics and advise blacks of their rights. In the first confrontation with the police, Newton, Seale, and some other members walked out of the Party headquarters carrying their guns. A policeman confronted them and demanded to know what they were doing with their guns. Newton refused to answer on the grounds that the law only required that a citizen must give his name and address to an officer. Other police came and started harassing the black people who had gathered to watch. Newton told the people that a citizen had the right to stay and observe an officer carrying out his duty as long as the citizen stayed a reasonable distance away and did not interfere. After further threats, Newton warned the police that if they tried to take away his gun or shoot at him, he would shoot back. The police then gave in and left. The impact of this confrontation on the black community was electrifying. They had seen, as one Panther biographer said, "Something they had never seen before: black men, proud and dignified, daring to meet the white policemen on equal terms and face him down."[33] This initial confrontation brought in dozens of applications for membership. With more members, the Panthers increased their patrols of the police and began their program of advising the black community of their rights and offering free legal aid. During this initial period, the Panthers spent a great deal of time in disseminating knowledge of legal rights (mostly in the criminal area), the right of self-defense, and the promise that the Party would be available for protection. These were benefits to Party members, their friends and supporters in the black community because victimization, oppression, and arbitrary action by law enforcement people were among the most serious problems that blacks encountered. The Party grew very rapidly during this period, and chapters were established in many major cities throughout the country.

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The National Welfare Rights Organization provides another prominent example of the subsidiary use of litigation to build and maintain an organization.[34] In this example, the litigation was civil, not criminal, but the theory was the same: as with the civil rights workers and the Black Panther Party, the aim of the group was to exercise legal rights and then use litigation when those rights were denied. In contrast to the civil rights workers and the Black Panther Party, NWRO did not use litigation defensively to ward off attacks; rather, when their rights were denied, they were the moving parties. The idea for the NWRO grew out of the experience of a storefront service agency in New York City, Mobilization For Youth. As poor people began to come into MFY for help, it was discovered that many of these people had money problems and that they were either eligible for welfare but not enrolled or on welfare but not receiving what they were entitled to. The MFY staff rapidly became skilled in aggressive advocacy on behalf of their clients. At this time, under welfare, recipients were legally entitled to a variety of benefits in addition to their basic allowance. For example, it was New York City policy to allow an extra benefit of about $150 per family of four for winter clothing. In fact, however, these extra benefits were rarely made; most recipients did not know about them; if they did know and requested the benefits, the welfare caseworkers either refused the requests or gave less than the prescribed amounts. After handling a number of special grant request cases, MFY decided to bargain with the welfare department on behalf of groups of welfare recipients. At this time, there was a great deal of unrest in the urban ghettoes. The organization backed up its demands with mass picketings and demonstrations and demands for administrative hearings as required by federal law. In the first confrontation, the New York City welfare department gave in and shortly thereafter hundreds of families in the neighborhood received checks for winter

clothing. Naturally, word spread rapidly and within six months, thousands of welfare families began joining the campaigns for extra benefits. This was the start of the welfare rights organizations. At the height of the campaigns, NWRO workers would station themselves outside of welfare centers with check lists of various benefits that recipients would be entitled to. When recipients came into the outer office, they were asked to check the items that they had not received. Then, they went in to see the welfare caseworkers and demanded the items. If they were refused, the NWRO worker went back in with them to help them present their case. If the demand was still refused, requests for hearings were filed and lawyers were available. These campaigns were backed up by other kinds of political activities. There were marches, demonstrations, sit-ins, conventions, platforms, and lobbying. In New York City, at least, these campaigns were very effective. For example, in June 1967, special grants in New York City were about $3 million; in June, one year later, they were $13 million.

Although NWRO was interested in immediately increasing benefits for its members, and attracting new members, this was not the end in itself. Its effort was part of a larger strategy to reform the welfare system. The grand strategy, developed by Professor Richard A. Cloward, a founder of MFY, and Francis Fox Piven, and adopted by NWRO, proceeded on the plan that a massive drive to recruit the eligible poor onto welfare, and success in obtaining maximum benefits under the system, would disrupt state and local welfare agencies, force a fiscal crisis, and cause the Federal Government to take over welfare and enact a guaranteed income for all persons below a certain income level. The principal organizing tactic was to demand only legal benefits and legal rights.

The central place of the role of law in NWRO's strategy is illustrated by the subsequent history of the organization. Eventually, welfare agencies

struck back by two principal methods. The most important counter measure was to eliminate special grants. At a stroke of the pen, NWRO was robbed of its principal organizing tool and its power to continue to create a massive fiscal crisis. Welfare departments also countered the administrative hearing strategy by continuing to delay hearings or conducting hearings but still denying requests. Welfare organizations lacked the resources to pursue judicial remedies on a massive scale. Finally, the importance of backing up demands by mass action also lessened with the subsiding of urban tensions. For a while, though, there was the possibility of some basic changes. Welfare rolls and costs had expanded enormously, the country was in a welfare crisis, and what looked like a step toward a nationally-administered guaranteed income for poor people was proposed by a Republican president and passed by one house of Congress. Many factors, of course, contributed to the welfare crisis and the drive for welfare reform.[35] Although measurement is difficult, it would seem that NWRO did play a significant part.[36]

In the preceding examples, litigation was used as an integral part of the social reform group's strategy on a continuous basis. Quite often, however, use of litigation is more limited, of an ad hoc nature, although still important. In the Montgomery bus boycott (1955-56), the goal of Reverend Martin Luther King, Jr.'s organization was to induce the city council to repeal the ordinance which required segregation on buses.[37] The boycott tactic had a number of advantages for blacks. It was not illegal and thus the leaders and participants could not be arrested legally. It avoided confrontation, which was important because any confrontation in the deep South at this time would have meant brutal repression. At the same time, it allowed the black leaders to mobilize outside resources by displaying moderation and self-discipline. The disadvantage of the non-confrontation boycott is that in the absence of more disruptive

behavior, the city council was not under any pressure to yield until the revenue loss began to hurt. For a long time, then, there was a stalemate. The matter was finally resolved by a lawsuit in which the court declared the ordinance unconstitutional. The city lost, but could save face by blaming the courts. The litigation allowed both sides to avoid escalating the conflict; litigation was used by leaders to sidetrack more militant members of the group.

In the Montgomery bus boycott, litigation came in after the confrontation came to a stalemate. In other kinds of situations, social reform groups will use litigation to produce conflict. For example, environmental groups will use litigation to gain time (i.e., to stop the bulldozer) to enable them to mobilize resources so that they can counter the moves of the developers. If the aim of the environmental group is strictly preservation -- that is, no development whatsoever -- and they think that they can accomplish this through court action, then this wou'd be litigation for an affirmative goal. But quite often, the goal is merely to prevent a fait accompli so that the development can proceed with greater regard to environmental considerations. This would be a subsidiary use of litigation.

The uses of litigation for subsidiary purposes are quite varied. But success also varies. With the availability of free or low-cost legal services, litigation involves a fairly minimal commitment of resources by the social movement group. Once litigation gets underway, resolution of the conflict often becomes a matter between the lawyers and the leaders of the organization. The legal proceedings may become long and drawn out, thus raising problems of maintaining the organization. Members of the group may simply drift away from lack of activity and interest. There can also develop a heavy dependence on lawyers. Many legal services lawyers who worked with minority and poverty groups stress the real dangers of cooptation by the lawyers. Then, there is

always the possibility of losing the case, which may result in a loss of legitimacy for the group.[38] Victories, too, can take their toll. Despite the fact that the Federal Government has lost decisively practically all of the political trials during the past few years and has been defeated in most of its grand jury proceedings against political radicals, these have been very hard-fought, difficult legal battles. One significant effect has been seriously to deplete the resources of the radical political left. Sympathetic lawyers cannot engage in these trials very often, and, at the present time, there is a real shortage of sympathetic legal resources.[39]

Affirmative Litigation. The most serious problems of using litigation arise when litigation is used affirmatively, that is, to accomplish the substantive goals of the social reform group. At least four types of enforcement problems pose particularly difficult hurdles for social reform groups.

1. Enforcement involves massive lower-level official discretionary decisions. This is very likely the most common and formidable hurdle that social reform groups face -- when favorable court decisions and legislation are addressed to vast numbers of lower-level officials and direct them to change their activities. When voluntary compliance is not forthcoming, social reform movements are usually incapable of countering lower-level official intransigence.

Perhaps the foremost example of this difficulty is the school desegregation controversy. The basic decision in 1954, Brown v. Board of Education, was the culmination of many years of efforts of the NAACP to attack segregation in the courts. Its importance for black civil rights leaders could not be overestimated. They considered it "a visible sign . . . that the white establishment and federal government were supporting the legal road to changing their subordinate position."[40] According to Louis Lomax, blacks were confident that

their victory for an integrated society had come. They felt that the white establishment of the South, while not in favor of integration, would insist on law and order and not be bullied and cowed into submission by white trash, fanatics, and mobs. It was anticipated that local school boards would voluntarily obey the Supreme Court.[41]

The decision was viewed as of equal importance by the white opposition to desegregation. According to Anthony Lewis, "Any breakdown in school segregation necessarily endangered the perpetuation of the southern myth that the Negro is by nature culturally distinct and inferior. And there was the fear -- surely felt deeply by many in the South, however others regarded it -- that school integration was a step toward racial intermarriage."[42] Mississippi's Senator James Eastland said, "The people of the South will never accept this monstrous decision. I predict this decision will bring a century of litigation."[43]

Desegregation began to occur almost immediately in the border areas of the country, and by 1956, several hundred school districts integrated voluntarily.[44] Then the tide turned. The Southern Manifesto of 1956, signed by 101 U.S. Senators and Congressmen called the Brown decision a "clear abuse of of judicial power." Southern states started their massive resistance campaigns, and violent resistance movements spread rapidly throughout the South. The Southern strategy was massive oppositon by a determined, but substantial minority. The opposition took two forms. Social and economic pressure, violence, and mob action would intimidate blacks and moderate whites and there would be a massive legal battle. Every school district and every other move at desegregation would be litigated. The Southerners hoped that eventually public opinion would turn against the Court and either the decision would be reversed or lapse for lack of enforcement. At this time, the North was

relatively indifferent to civil rights and the Federal Government, under President Eisenhower, was equivocating in its support of the Supreme Court.[45]

The legislative components of the massive resistance strategy took a variety of forms. Initially, the laws provided for withdrawing state funds from any school district that adopted desegregation plans; closing such schools; repealing compulsory education laws; providing tuition grants for private schools; cutting off salaries of teachers in desegregated schools; and preventing school boards from borrowing from their usual commercial sources. As these laws were declared invalid, more subtle techniques were adopted, such as pupil placement laws. These laws -- which did not mention race -- allowed local officials to assign pupils to schools on the basis of various criteria. In fact, the assignments were used to perpetuate segregation. Black students who objected faced a maze of administrative hurdles and then difficult court battles. School boards also adopted assignment plans on the basis of geographic zones. Whether the lines of any particular plan were gerrymandered to preserve segregation presented questions usually difficult to litigate, especially if the blacks had the burden of proof. To geographic school districts were added zoning plans, provisions for assignments or open enrollments. Then, if desegregation plans were adopted, the boards fought for the longest time periods possible.[46]

By 1961, the U.S. Civil Rights Commission reported that the trend in desegregation had turned from voluntary compliance to desegregation by court order only. Moreover, the cases were hard fought, long, and complicated. In the typical public school case, seven years would elapse between the start of the litigation and the actual non-discriminatory admission of black children.[47] Charles Silberman reported that ten years after the Brown decision two of the four school districts' original defendants had still not admitted a single

black student. In ten states of the Deep South, less than six-tenths of one percent of all black students were in desegregated schools.[48] Writing in 1963, Louis Lomax reported that it took seven years of effort to get only seven percent of the black children in the South into desegregated schools.[49]

Segregation in public schools was not the only issue. The federal courts invalidated segregation laws for a variety of public facilities, but the follow-up here too required litigation, if communities refused to comply voluntarily. The NAACP and other civil rights organizations did not have the resources to challenge this kind of massive resistance on a comprehensive basis. Even after a great deal of civil rights activities, some communities did not have a single desegregated facility, and in others, desegregation was minimal (e.g., involving only a few lunch counters). In Montgomery itself, after the boycott was over, white violence increased, juries refused to convict, and the city passed several new segregation ordinances. Martin Luther King's organization lacked the resources to challenge these laws.[50] Silberman reports that seven years after the court-ordered integration of the buses, most blacks "had returned to the old custom of riding in the back of the bus."[51]

By 1961, blacks had grown impatient and frustrated with the strategy of integration through court order. This approach was time consuming, costly, and seemed to produce such small results. Attention turned to non-violent, direct action techniques adopted by Martin Luther King, Jr., and the black students in southern colleges.

The Student Non-violent Coordinating Committee (SNCC) was formed out of the centers of student sit-in activity that swept the South in 1960. In conjunction with their efforts to desegregate a variety of facilities through direct action (e.g., they were active participants in the Freedom Rides),

they also began voter registration projects in the Deep South. The workers met with political harassment (cutting off welfare for blacks who wanted to register), violence (bombing of SNCC offices, beatings, murder), arrests, and slow-downs at registrars' offices. After the passage of the Civil Rights Act of 1964, SNCC's first effort was to try to build a political organization outside of the Mississippi Democratic Party; the SNCC promoted group hoped to be recognized as the official Democratic Party at the 1964 Convention. Although SNCC spent a great deal of effort organizing the Mississippi Freedom Democratic Party, the convention refused to seat the delegates. As a result of this defeat, SNCC decided that national politics were unreliable and that blacks must organize their own local political base. In the Spring of 1965, after the murder of a civil rights worker in Lowndes County, Alabama, SNCC workers went into that county to form a new political party, the Lowndes County Freedom Organization, to run candidates for county offices. In order to be recognized as a legitimate political party, LCFO had to win 20 percent of the votes cast in elections for county office. After a year and a half of very dangerous grass roots political activity, which included a variety of education projects, canvassing, assistance projects for victims of economic and social retaliation, LCFO candidates failed to qualify in a county that was 81 percent black. Many blacks were brought to the polls by plantation owners to vote for white candidates. Blacks who asked for LCFO help found themselves without homes or jobs, as did three LCFO candidates, two poll watchers, and the father of one of the candidates. Blacks were too intimidated by harassment, violence, and other forms of pressure to register and vote for their own party.

There were other voter registration drives going on during the early sixties. In 1964, the leading civil rights organizations sponsored Freedom Day in Canton, Mississippi, to register voters. When black tenant farmers who registered were

thrown off the land, they formed Tent Cities; SNCC organized food and clothing drives to support them. The National Council of Churches and SNCC sponsored orientation sessions in preparation for Mississippi Summer project in 1965 to run freedom schools and register black voters. This project was staffed almost entirely by SNCC and CORE, another leading civil rights organization. Over 700 young people, mostly white middle-class students, spent the summer teaching in the schools, helping voters to register, and building community organizations. In Alabama, SNCC and SCLC began a massive right-to-vote campaign in January, 1965. During one demonstration, hundreds of marchers, including the SNCC chairman, were beaten, whipped, and tear-gassed.

What were the results of these activities? Anthony Oberschall concludes:

> Despite several large-scale civil rights projects in the Deep South in the years 1964-1966 . . . in which many white college youth and some lawyers, ministers, and physicians participated, the results measured in terms of increased voter registration, in the face of arrests, shooting bombings, and burnings, and equally important, in the face of black fears of reprisals, were meager indeed.[52]

Blacks faced intransigent voting registrars, corrupt and brutal law-enforcement personnel, and in many instances, prejudiced judges. SNCC turned northward and inward toward its policy of black nationalism, separatism, and abandoned non-violence as a viable strategy.

During the next half decade, black registration in the South began to increase steadily. The principal reason for this change was the Voting Rights Act of 1965. There were two major changes by that law. First, all of the discretionary parts of state voting legislation were eliminated. An individual who attended six years of school was conclusively presumed to have the necessary educational qualifications to vote. Secondly, Federal registrars would replace Southern state and local officials automatically if registration figures of

blacks fell below a certain proportion of the population. In many areas of the country Federal registrars were appointed to register blacks and in other parts, the state and local registrars realized that their strategy of intransigence would result in their replacement.[53] The Voting Rights Act of 1965 was successful, then, not only because of a stiffening attitude on behalf of the Federal Government but also because it eliminated the stumbling block of discretionary lower-level official decisions.

The failure of the desegregation and voter registration campaigns in the South during the years 1956-1966 were dramatic examples of the obstacles that social movement groups face in trying to implement legal rules in the face of massive resistance on the part of lower-level officials. The same problem is well-known in many other fields. There is great difficulty in getting police officers to follow court rules which the police feel will shackle them in their work. Sharing such attitudes with the police are welfare caseworkers, public health personnel, building inspectors, child protection workers, housing officials, lower criminal and civil courts, probation officers, prison officials, and those who work in dozens of other federal, state, and local regulatory agencies. They all share common characteristics. The aim of the social reform group is to have the regulatory officials change their conduct; most often, it is to have them obey the law. If the lower-level officials feel strongly that the law is wrong, they can employ a variety of tactics to ignore the law. Their chief weapon is that their clients either are not aware of the law or are afraid to seek enforcement. Fear is a particularly important problem if the clients are subject to retaliation; and in the examples given, most of the clients are vulnerable because they have a more or less continuing relationship with the agency.[54] Ignorance and fear can be overcome by a social reform organization that is capable of disseminating the necessary information, engaging in the

necessary advocacy, and protecting those willing to stand up. With massive, pervasive regulatory programs like education, voting registration, police, welfare, or health, the lawlessness of front-line officials may be so widespread and so diffuse, that the task of ensuring compliance becomes insuperable.

2. Enforcement involves massive private discretionary decisions

The second type of enforcement problem is where favorable legal rules favorable to a group require compliance from massive numbers of people in the private sector. In some situations, government agencies are charged with enforcing the rules against private parties. Although government agencies can take the initiative, the usual practice is for them to respond to pressure from aggrieved persons. For example, where laws prohibit employment discrimination, it has long been recognized that private remedies are ineffective, and there are now government agencies with enforcement powers. However, with few exceptions private complaints must activate the agencies, and even if the agencies obtain favorable decisions, subsequent monitoring has to be used to make sure that the discriminator adheres to the order or the agreement. Employment discrimination is widespread and the victims, of course, are among the most powerless people in society. Individual action is sporadic and problematic because of the difficulties in getting government agencies to respond, the difficulties in proving discrimination, and the ability of discriminators to delay and negotiate settlements favorable to themselves, especially in view of the fact that the government agencies have limited resources. Social reform groups have attempted to fight cases and negotiate settlements on behalf of their membership or constituencies, but the diffusion of the problem over many employers, the poverty of the constituency, and the difficulty that these organizations have in maintaining sufficient membership support present serious obstacles to enforcement. In recent cases, there has been more

success in negotiating favorable agreements among some large employers, but this has been due to leverage obtained from outside resources, primarily in the form of foundation supported lawyers. The agreements are with very large employers (e.g., Bell Telephone of California, some large banks), and it is too early to tell whether the organizations are capable of monitoring the agreements. For the masses of minorities throughout the country, the laws prohibiting employment discrimination remain a dead letter.

Gary Bellow, a former OEO poverty lawyer, provides another example from his work with migrant labor:

> "Rule" change, without a political base to support it, just doesn't produce any substantial result because rules are not self-executing; they require an enforcement mechanism. California has the best laws governing working conditions of farm laborers . . . [W]orkers are guaranteed toilets in the fields, clear, cool drinking water, covered with wiremesh to keep flies away, regular rest periods, and a number of other "protections." But when you drive into the San Joaquin Valley, you'll find there are no toilets in field after field, and that the drinking water is neither cool, nor clean, nor covered. If it's provided at all, the containers will be rusty and decrepit. It doesn't matter that there's a law on the books. There's absolutely no enforcement mechanism. Enforcement decisions are dominated by a political structure that has no interest in prosecuting, disciplining or regulating the state's agricultural interests.[55]

The current controversy over abortion reform presents a different situation.[56] Here, a public law enforcement agency does not stand between those who seek to implement the law and those who refuse. The employment discrimination and farm labor situations involve the disenfranchised in American society and social reform groups here are naturally among the weakest. Although abortion is much in demand among minorities and poor people, it is also a middle-class issue and there are active, vigorous social reform groups composed of middle-class members who do have resources. The demand for abortions, then, cuts across class lines. On the supply side, one would have predicted ready compliance with the law. Doctors can act privately, and there is money to be made since there is a large

demand and the procedure is relatively simple and routine. In fact, one could even have expected profit-making abortion clinics to have sprung up around the country. So far, this has not happened, and although there are many more abortions now being performed, on the whole, in many parts of the country, there is massive resistance to a more liberal policy.

Abortion reform activity has a long history; Margaret Sanger was first indicted in 1914. But its most vigorous period began as late as the 1960s. All states at that time still prohibited abortion, except to save the woman's life.[57] Through therapeutic abortion committees, hospitals restricted abortions by creating quota systems and charging high fees. Many public hospitals virtually eliminated abortions for the poor. Starting in the 1960s, a few doctors and individuals began challenging these laws by openly performing abortions, disseminating information, and making referrals. There were arrests and some convictions, but also, some lower courts declared the laws invalid. At about this time social reform group activity began to gather strength. In part, this trend was stimulated by the notoriety of the criminal prosecutions and some of the successful litigation. The National Organization for Women included abortions as part of its bill of rights. The prestigious Clergy Consultation Service on Abortion (CCS) as well as the National Association for the Repeal of Abortion Laws (NARAL) were formed. Other referral groups sprang up around the country. Sponsors of the NARAL were Congresswoman Shirley Chisholm, Senator Maurine Neuberger, the American Baptist Convention, American Civil Liberties Union, and the Women's Club of New York. In addition to referral, these organizations engaged in lobbying and demonstrations.

Legislative activity started with public hearings in 1966 on proposed reform in New York. Although the bill failed at that time, the effort was the first important serious attention paid to abortion reform in any state. In

1967, three states -- Colorado, California, and North Carolina -- passed the first liberalized laws; abortions could be performed to preserve the woman's life and physical and mental health, in cases of rape, incest, or where there was reason to believe that the fetus might be defective. The impact of these laws indicated that implementation was not going to be what reformers expected. In Colorado, nineteen out of twenty women seeking abortions were rejected, fees were high, and only five out of the state's fifty hospitals performed 81 percent of the abortions. Hospitals imposed restrictions over and above the law. Small quotas and complex administrative machinery were established. In California, where it is estimated that over 100,000 illegal abortions are performed annually, hospitals performed only about 2,000 abortions in 1968; blacks received only 10 percent of the legal abortions, and fees ranged between $600 and $800.

In 1969 the abortion laws in California and the District of Columbia were declared unconstitutional. The medical profession generally ignored the decisions. In the District of Columbia, abortion committees were retained in the hospitals and they continued to reject most applicants. The public hospital -- D.C. General -- refused to take abortion cases. It took two additional court actions by abortion reformers before this hospital agreed to set up a special abortion unit. In Wisconsin, the federal court declared the state law unconstitutional, but had to issue orders preventing local law enforcement officials from subsequent prosecutions of two doctors. In the meantime, lawsuits were brought in other states.

In 1970, liberalized laws were passed in four other states, including New York. In New York, hospitals and the State Health Commissioner sought to restrict abortions to hospitals, which quickly developed long waiting lists and restrictive requirements. Many clinics and medical groups defied the

Commissioner. In a further effort to restrict abortions, Governor Rockefeller banned Medicaid payments for abortions.

Then, in 1973, the U.S. Supreme Court invalidated most state laws restricting access to abortion.[58] The Court held that a state may not regulate abortions during the first three months of pregnancy, but may regulate abortions in the second three months to protect the health of the mother, and in the third three months to protect the fetus and the mother. The Court gave no opinion on whether hospitals may be forced to perform abortions if they choose not to.

The Supreme Court's decision was effective immediately. Since abortions could now be performed regardless of existing state law, state legislatures began to act quickly. However, few states enacted laws implementing the decisions. Several re-enacted old laws or laws plainly unconstitutional which have produced further litigation. Others are seeking to establish the right of any individual or institution to refuse to provide abortion services. Many state legislatures have called on Congress for a constitutional amendment overruling the Court. On the administrative level, there continues to be discrimination against the poor.

At the present time, although legal abortions have increased, the situation is in flux. In most areas of the country, abortions are still not available. Hospitals and doctors refuse to perform the service, and there have been some lower court decisions upholding this right. There is very active opposition to abortion, led by the Catholic Church, which continues to exert great pressure at the local and national level. And the profit-making services have not grown as anticipated. Instead of a great deal of abortion activity as a result of the Court decisions, quite the opposite has happened. The states and law enforcement processes are in a holding action, passing unconstitutional laws and threatening unconstitutional prosecutions. In many respects, the abortion

controversy resembles the civil rights struggle. There is still massive resistance to offering legal abortions.

3. Enforcement requires continuous inputs at key regulatory agencies

In the two types of enforcement problems already examined, social reform groups are able to win a court decision or a legislative rule change, but are stopped primarily because of the decision-making authority for implementation is very widely diffused. There are also enforcement problems when decision-making authority remains within a single agency. This kind of enforcement problem arises because regulation is a continuous process and a rule change is usually only one stage in the process. Unless the rule change is designed to bring the activity to a complete halt, which is rare, the political, social, and economic forces that are subject to regulation continue to exert their efforts to cope with any new legal rules that social reform groups have been able to accomplish before courts or other governmental bodies.

One of the theories behind recent litigation by environmental and consumer groups is that for a long time regulatory agencies have only been listening to the industries that are the subject of the regulation and hence have become captiv to their point of view. The initial purpose of the new style of litigation was procedural -- to open up the decision-making process so that the environmentalists or consumer points of view could be expressed. Regulatory agencies would, then, be more likely to take account of other points of view and reach decisions more in "the public interest." One of the principal, early court decisions upholding the environmentalists was Scenic Hudson Preservation Committee v. Federal Power Commission, previously discussed. It will be recalled that the court held that the Federal Power Commission must take into account environmental and aesthetic considerations, and, in doing so, grant an opportunity to be heard to those who had a special interest in these matters (i.e., environmental groups). What the

court did not hold was that the agency must change its substantive decision; the ruling was only that the agency should take another point of view into consideration and, if it did this fairly, it was free to abide by its original position. And in fact, this was the ultimate result in this particular case. The environmentalists presented their evidence to the agency; the agency considered the evidence, rejected it, and then authorized the construction of the power plant.

Although the social reform group failed to win the particular result it sought in the Scenic Hudson case, it did win an important principle. This principle has been extended, mainly by the National Environmental Policy Act (NEPA) as well as by state legislation, to many areas of regulation that affect the environment. Under these laws in many areas of activity, regulatory agencies may not go ahead without giving environmental groups an opportunity to be heard. Under NEPA, federal agencies must file environmental impact statements before they give approval to both private and public activity. At first, agencies claimed that NEPA did not apply to them, or, they did not take the Act seriously and filed superficial impact statements. These agencies immediately ran into trouble and the environmentalists won many cases. Highways, urban renewal projects, and a great variety of projects that affected wilderness areas and conservation (e.g., dams, roads, exploitation of mineral and lumber rights, etc.) were stopped for failure to comply with NEPA. The most famous case involved the proposed construction of the Trans-Alaska Pipeline, where social reform groups and public interest law firms halted the construction of the pipeline. These decisions came as great shocks to the business world and many parts of government. Environmental groups, and their public interest lawyers were using litigation apparently to great advantage. The opposition began to cry that the environmentalists were zealots, they were going "too far," and that growth and development would be unnecessarily restricted.

The initial decisions under NEPA were procedural only; there remained the problem of implementation. The first problem of implementation involved taking advantage of the opportunity to be heard. Many of the substantive issues in the environmental disputes are extraordinarily complex. The affected industry has the resources to buttress its position with technical expertise which is not only often scarce, but expensive. Such social reform groups as the Sierra Club, the Wilderness Society, and the Friends of the Earth, are membership organizations and rely to a great extent on voluntary contributions of expertise. They cannot even finance the initial NEPA lawsuits; public interest law firms, financed by foundations, provide the legal resources. Environment group members who are engineers and scientists cannot counter industry expertise by donating a couple of evenings a week or a day or two on a weekend.

An example of this kind of problem arose recently in the area of maritime oil pollution. On behalf of three environmental organizations, a public interest law firm filed a lawsuit to enjoin the Secretary of Commerce and the Maritime Subsidy Board from awarding construction subsidies for oil tankers; petitioners charged failure to comply with NEPA. Shipyards, ship purchasers, ship building and operating unions, and the shipbuilders' trade association intervened. A settlement was quickly reached which provided that the Government would provide a comprehensive environmental impact statement that would cover the following matters: the tanker construction program as a whole, as well as the tankers presently under construction, present and future pollution abatement specifications, oil pollution effects of tankers, alternatives to the tanker construction program, alternative mixes of oil carrying vessels and their relative environmental effects, alternative design and equipment requirements for oil carrying vessels, such as double bottoms and fully segregated ballast

systems, alternative energy strategies such as reducing the demand for oil, and the environmental impact of the deep water port development which would be necessary to accommodate supertankers. The settlement was signed on January 8, 1973; the draft impact statement was due to be released on February 19; all interested parties would then have 15 days to submit comments; another draft statement would be released on March 15, with public hearings on May 1, and final comments due on May 15.

The settlement was considered an important victory for the environmentalists and the Government seemed genuinely cooperative. The immediate problem, though, was whether the environmentalists could take advantage of the opportunity that they won. There were enormous financial stakes involved, and the relevant industry had no difficulty in marshalling its expertise. The environmental groups, on the other hand, had a very difficult time. They needed highly competent experts willing to devote substantial blocks of time on relatively short notice if the groups were going to have any sort of substantive input on the environmental impact statement. Furthermore, this was not a one-shot matter. With varying degrees of specificity the environmental impact statement would function as a blueprint as to how construction should proceed on existing and future vessels and ports. Even without environmental considerations, there are always changes in construction plans as technical and economic contingencies materialize. If we can assume that changes to meet the environmental considerations are more costly, then as the construction proceeds, the industry will seek modifications of the original impact statement. The environmentalists will have to be ready to consider proposed construction changes from their perspective and be prepared to press their point of view with the government agency. Otherwise, in time, the agency will again fall captive to the industry, which will usually be the agency's primary source of information.

The need for a continuous input of information is well-illustrated by the Trans-Alaskan Pipeline controversy. As a result of the litigation and the complete stopping of construction, the Department of Interior and the industry finally took NEPA seriously and drafted a comprehensive impact statement in which many of the design features of the pipeline and the construction process were altered to lessen environmental damage and risks. Construction was finally authorized through an Act of Congress. It could be argued that because the present construction plans are so much more sound from an environmental point of view than the original proposal, this was really a victory for the environmental groups. The environmentalists did have a substantive impact even though some groups favored no pipeline at all. But whether or not this victory will prove hollow depends on how the construction will actually proceed. Throughout the whole controversy, the Department of Interior was singularly unsympathetic to the environmentalists. Now, with the energy crisis, there should be enormous pressure to modify the impact statement to save costs and time. Unless the environmental groups are capable of persevering, even their partial victory will almost certainly evaporate.

The problem of continuing inputs is not only restricted to the environmental field. As a result of a petition from various consumer groups, including Ralph Nader, the Federal Trade Commission announced a new procedure whereby all major companies, on an industry basis, would provide the agency with documented support for claims made in their advertisements. The Commission started by asking substantiation from manufacturers of automobiles, electric razors, air conditioners, toothpaste, and head cold remedies. The problem now is keeping up with the flood of information that is pouring in.[59] The agency has already fallen behind, and since the future of its pro-consumer orientation is becoming problematic, it is up to the consumer group to monitor this information. If

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these groups wish to make a substantive contribution in product advertising, they will have to have the capacity to commit extensive technical resources.

Product safety and quality, truth in advertising, defective, dangerous, or ineffective drugs, and many other important consumer matters are continuing problems. Manufacturers and advertising agencies are constantly probing the permissible limits of the law. Regulatory agencies were created to develop the expertise and the staying power to keep abreast of the industry. To the extent that social reform groups think that the agencies are failing in their job, then these groups have to supply the missing inputs, and this means for them, expertise and staying power.

4. The strongly recalcitrant government defendant

An illustration of the fourth kind of enforcement problem involves the State of California's refusal to implement federal law requiring an increase in welfare benefits.[60]

Under the existing AFDC program, the California State Department of Social Welfare determined each recipient's minimum need by computing budgets which represented allowances for housing, food, clothing, personal needs, recreation, and other needs. (In practice, the amounts contained in these cost schedules were really below actual minimum costs of many of the items.) Once a family's needs were determined on the basis of the cost schedule, the county departments of welfare then calculated the amount of non-exempt income the family had available, and if the family's need exceeded its available income, the family's need requirement was met by AFDC. The family was paid the difference between its income and its need standard unless the difference would exceed an arbitrarily placed maximum amount that the state would give for a family of that size. This sytem was known as the "maximum grant."

In an effort to compel the states to increase their AFDC grants, Congress enacted legislation under which by July 1 of 1969 the states must increase their need standards and their maximum grants to reflect changes in the cost of living. There was a long controversy over the precise meaning of this law, and particularly whether a state could avoid the law by raising its need standard, but reducing the actual payments through a rateable reduction system.[61] Ultimately, the Supreme Court held that states with rateable reduction systems could do this and many states did so;[62] but there was no doubt that this kind of loophole did not exist for California or any other state that used a maximum grant system.

From the beginning, it was understood by high officials in the California State Department exactly what the new law meant and that they were required to raise the maximum grants in the state. Nevertheless, when the statute was passed by Congress, and despite the fact that the states were given 18 months to meet the requirements, California did nothing to implement the statute. The July 1st date went by, there was no compliance by California, and no action by HEW to enforce the law. On August 6, 1969 a class action on behalf of all California AFDC recipients was commenced in the Federal District Court to require California to comply with the statute. California strenuously resisted the lawsuit and delayed any rapid judicial decision. In the meantime, HEW, although aware of California's non-conformity, did not take any action. In the fall and spring of 1969 and 1970, HEW began to write letters of inquiry to California concerning non-compliance but took no concrete action. Then, the National Welfare Rights Organization filed suit against HEW to require that agency to take steps to secure compliance from non-conforming states. In apparent response to the NWRO suit, HEW began starting the procedures against several states, including California. This procedure requires a hearing and if a state is found to be

not in compliance with federal requirements, then the Federal Government terminates its share of the welfare cost-sharing. On August 25, 1970, now 13 months after Congress required compliance, HEW held a hearing on California's non-compliance. California immediately tried to convice the Federal Court to defer any action in that lawsuit until HEW had an opportunity to act. The Federal Court refused to do so because it recognized, as did everybody else, that the HEW sanction of termination of funds was extremely limited and very unlikely to be used.

After the close of the August HEW hearing, the recipients presented their claims in the Federal Court. In September 1970, the Federal Court required an immediate increase in the maximum grants to conform to federal law. Following this court order, the HEW hearing examiner issued his proposed decision finding California to be in violation of federal law and further finding that as a result of the violation there was widespread malnutrition and suffering on the part of welfare children. Nevertheless, California refused to increase the grants. Instead on November 24, California submitted to the Federal Court a proposal to increase the maximum on paper but to reduce the actual payments to a level of 69 percent of the state's determined need standard. This proposal was in clear violation of the state law since state law did not permit rateable reductions. At the same time, California appealed the federal court order, which had ordered immediate grant increases, and in December 1970, the Court of Appeals stayed the District Court's order.

After California proposed its rateable reduction system, the plaintiffs commenced an action in the state court in which they sought to enjoin any reduction of AFDC grants pursuant to that plan. At the same time, a conflicting court order was issued from a state court in Los Angeles enjoining any increase

in maximum grants. Both of these cases were quickly brought to the California Supreme Court.

While the case was pending in the California Supreme Court, HEW issued its final report holding California in violation of federal law and ordering a termination of federal funds to California effective April 1, 1971. This decision was issued on January 8, 1971 and was immediately followed by a series of conferences between Governor Reagan, Vice President Agnew and HEW Secretary Richardson. The following day, HEW withdrew its decision to terminate the federal funds.

In March 1971, the California Supreme Court, in a unanimous decision, held that the California Department of Social Welfare had no authority to adopt the 69 percent rateable reduction system, and did have authority to increase the maximum grants to conform to federal law. The court also recognized a clear and continued violation of federal law by the state.

In the meantime, the plaintiffs continued to press HEW to reissue its non-conformity decision and they finally brought suit to force HEW to act. One week after the California Supreme Court removed any doubt about California's ability to comply with federal law, HEW issued its decision and ordered a termination of federal funds, the California State Department of Welfare raised its grants effective July 1, 1971, which was 23 months after Congress had mandated the increase and almost a year after HEW had notified California that a conformity hearing would be held.

In reviewing this episode, a number of things should be noted. First of all, in contrast to most of our other examples, there was a clear violation of law. The California officials had no doubt as to what the law required; there was not even discretion as to implementation, which local schools boards at least could claim under the Brown decision. Second, the relief sought was

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money payments. Implementation did not require massive lower-level discretionary decisions, or continuous inputs to an on-going administrative process, or the staffing of an administrative bureaucracy. All that the state had to do was re-calculate the standards and re-program the check-writing machines. The effective date of the legislation was generous, and California could not seriously plead poverty. Next to enjoining activity, money relief is the easiest kind of order to enforce.

Although this case is, no doubt, unusual, it does illustrate the problems that social reform groups face. Despite a clear legal duty, it took two years of extensive litigation in five different forums before the defendant finally capitulated. All of the litigation work was done by OEO legal services lawyers. That is, the social reform groups contributed little or nothing to the legal battle.

3. Conclusions: Theories of Groups

In conflicts over social change, the legal system is used by those who seek to maintain the status quo and those who seek to alter the existing distribution of social, political, and economic power. Changes in legal rules alone do not bring about changes in the social order. Changes in legal rules are more often than not only additional factors in the processes of social conflict. Individuals, groups, and organizations have to be induced to change. The extent to which social reform groups have been able to accomplish change by using the legal system varies greatly. Results can be very dramatic when litigation is used defensively. Small, weak, and despised groups have been able to thwart the combined power of the executive and legislative branches of government. In terms of the pluralist model, the judiciary hears the claims of groups that are rejected elsewhere. Results become much more problematic as social reform groups use the legal system for other purposes. Despite the

enactment of new laws, the fashioning of new rights, the openness of the judiciary, and the availability of subsidized legal talent, social reform groups are able to use the legal system for limited purposes, and, as we have seen, often encounter insuperable problems of implementation. Other groups in society, for example, trade associations, unions, and various kinds of special interest groups, seem to have more success. What is it about social reform groups that explains this varied, but on the whole, not very effective use of the legal system?

Recent social science theories of groups provide an analytic framework which sheds light on why social reform groups have difficulty in enforcing legal victories. The traditional assumption about the behavior of social reform groups is that individuals with common interests will attempt to act together to further those common interests since all members of the group would be better off if the objectives of the group were achieved. Thus, acting with a group is rational, self-interested behavior on the part of individuals. Mancur Olson, Jr., an economist, in his book, The Logic of Collective Action,[63] argues that this basic assumption is incorrect. In fact, says Olson, the opposite is the case. Unless the group is small, or there is coercion or some other special device, rational, self-interested individuals will not act together to achieve common interests.

The key to Olson's analysis is the distinction, well known to economists, between collective goods and selective goods. A collective or public good is one that if any person in a group consumes it, others in that group can also consume it. A public park is an example of a public or collective good. Collective goods that organizations seek to obtain would be, for example, higher wages for workers in a plant, favorable legislation for a particular interest group, avoidance of regulation. These examples point to a second basic element of collective goods, namely, that members of the enjoying group can still consume

the good even though they have not paid or contributed anything to obtain that good. A union may be able to negotiate for higher wages and better working conditions, but unless there is some mechanism to force a particular worker to join the union or to pay union dues, he gets the benefit of the union bargain without making any contribution. Collective goods, then, involve the problem of the "free rider," the person who can consume the good without paying anything for its cost.

The basic purpose of an organization is to provide a generalized benefit -- that is, a collective good -- for all of its members. Under what circumstances, if any, will an individual join or contribute to an organization? Olson's hypothesis is that if the individual's efforts will not have an appreciable effect on the efforts of the organization, and, if at the same time, he can enjoy the benefits of the collective good that the organization provides, then there is no incentive for him to contribute to the organization. On the other hand, if a person finds that the personal benefit from consuming the collective good exceeds the cost of providing at least some amount of that good, then he will contribute to the organization. This latter situation will most likely occur if the group is small or if there are considerable degrees of inequality within the group so that some members will receive a disproportionate share of the collective good.[64]

The most important reason why a small group can supply a collective good is the attractiveness of that good to individual members. In this respect, there is a basic difference between large and small groups. With the former, it is far less likely to act to obtain collective goods; and the larger the group, the less likely it will be able to further the common interests of its members. If the group is so large that an individual's contribution has no noticeable effect on the others' costs and benefits, then unless there is

coercion or some other incentives, collective goods will not be provided. The most important variable, according to Olson, is the number of people in the group.[65]

Olson then discusses the impact of organization costs on group behavior. Organization costs are different from the direct expenditures for the collective good -- that is, resource costs. Organization costs cover things like communication among members, costs of bargaining, staffing, and maintaining the organization. Naturally, the larger the organization, the higher the organization costs.

The three factors, then, that act cumulatively to prevent large groups from furthering their common interests are: (1) the small size of the benefit of the collective good to any one member; (2) the larger the group, the less likely that there would be a small subgroup that would be willing to pay for the cost of the collective good; and (3) the larger the group, the higher the organizational costs. For large groups, then, rational members will act on behalf of the common interests only if there are separate and selective incentives; that is, contributors are treated differently than non-contributors.

Large groups can be mobilized by leaders who receive selective incentives. Groups also become mobilized through social pressure; social status and acceptance are selective incentives since they distingush among individuals. Moral incentives are also selective incentives for the same reason -- they distinguish among those who contribute and those who do not. But social and moral incentives would only operate in small or intermediate groups, not with large groups. Olson's conclusion, then, is that in the United States, most large organizations have had to develop special institutions to solve their membership problem.

Olson uses a number of examples to support his theory. A primary example, of course, is labor unions. Unions provide selective benefits -- insurance,

grievance procedures, seniority rights, social amenities, etc., but to maintain their membership they have to rely on either compulsion (e.g., the union shop), or picket lines or violence. The members themselves rarely attend meetings, but are overwhelmingly in favor of compulsory membership and the obligation to pay considerable dues. According to Olson, this is economic rationality; the individual members obtain the benefits of union membership whether they attend meetings or not.

Olson also uses his theory to criticize the interest group theory of politics. This theory seeks to explain American political life in terms of the growth and competition of special interest groups. The balancing out of group pressures constitutes the existing state of society. This result is a reasonably just determinant of social policy since groups have a degree of pressure or power more or less in proportion to their numbers. The political scientists who argue this theory claim that generally speaking, the larger, more nearly general interest would usually tend to defeat the smaller, narrower special interest. The theory seeks to account for social change. The increase in complexity in society will tend to increase groups or associations which rise to fill the needs of people. This will be especially true in the economic sphere. Groups, according to political scientist David Truman, tend to arise when there is "suffering," "dislocation," and "disturbance." Group pressures alone determine the final equilibrium position at any one point in time because "excessive" demands are curtailed by overlapping memberships (e.g., tariff lobbyists are also consumers) and the rise of counter pressure groups. Olson's theory of group behavior sharply conflicts with this theory. At least in the economic sphere, the differenc between small and large groups qualifies the pluralistic theory that unreasonable demands by one group will necessarily be countered by demands of other groups so that the result will be just and reasonable. According to Olson, the smaller

group can frequently defeat the larger group, since members of the small group have sufficiently strong incentives to pay for the cost of the collective good.

But, how, then does one explain the activities of organized pressure groups in the United States? There are many large organizations, and they do exert great influence on government, the economy, and society. How are they able to achieve this power if their membership acts in terms of rational, self-interest? Olson claims that large economic groups that lobby and campaign for collective goods are also organized for some other purpose; and, in fact, the lobbying activities are really by-products of their main activities. These organizations can mobilize their membership through the use of selective incentives or coercion Labor unions, for example, only became powerful politically in the United States after they achieved compulsory membership. Many professional organizations have achieved guild status or provide selective incentives to join. In the economic sphere, Olson claims that the business community is composed of a series of oligopolistic industries each of which contains only a relatively small number of firms; thus apparently large groups really consist of small groups receiving selective benefits. For example, in almost half of the important trade associations, 50 percent of the costs are handled by a few members. In addition, trade associations also provide selective benefits to members.[66]

Olson fully acknowledges the implications of his theory for social change, and has little hope for the organizational capacity of the downtrodden and unrepresented in America -- e.g., the migrant workers, consumers, taxpayers, and (writing in 1965) "doves." Theodore Lowi, while not using Olson's analysis, also comes to a similar conclusion, namely, that interest group politics or liberal pluralism is a myth, and indeed, the capacity for American society to change via social reform movements becomes less and less likely.[67]

McCarthy and Zald, sociologists, offer a theory of social reform groups which differs from traditional theories and also, they claim, decreases the importance of Olson's analysis.[68] Traditional sociological theory of social reform groups, in the opinion of the authors, focused on the states of mind of the mass, the development of group consciousness about grievances, and the processes by which groups develop ideologies and social action.[69] This theory, while having a certain validity, fails to explain many of the characteristics of the recent upsurge of current social reform groups. To explain the new phenomena, the authors ask the question, how do social movement groups mobilize resources beyond their own membership. To the extent that groups are able to do this, they can avoid the large group "free rider" dilemma that Olson poses.

The authors reject the commonly-held explanation for the increase in social reform group activity, namely, that in affluent America there is a larger middle class with more leisure time which tends to participate more in social and civil organizations.[70] They claim that the affluent society participates not with time but with money. In addition, occupations have emerged that have greater control over the allocation of their time and thus can engage in social reform group activities for specific events. The authors point to student and professional populations which become available as "transitory teams" for specific purposes at specified times at relatively low cost. Ad hoc committees can be formed to run newspaper ads, circulate petitions, organize protest marches, and raise funds. These cadres of sympathizers come together for the event and then maintain loose ties after the period of the event is over.

Finally, the authors point to a dramatic change in the funding support for social reform groups. During the 1960s, churches, foundations, corporations, and individuals contributed heavily to social reform groups that were very different from prior beneficiaries. For example, foundation giving during the

period 1963-1970, showed an increase in "social participation grants" (primarily in the areas of race relations, urban problems, and poverty problems) from $3.7 million annually to $54.9 million. During the latter half of the 1960s, the government also funded social reform groups; there were some direct grants (e.g., to the National Welfare Rights Organization), and much indirect support through Community Action Programs, some Model Cities programs, VISTA, and legal services.

The new sources of support resulted in what the authors call "funded social movement organizations" that employed a leadership and staff that differed from prior leadership careers. Traditional analysis of social movement leadership noted the recruitment of leaders either from charismatic leaders emerging from the aggrieved group or from intellectuals who identified with the groups. The new development is the professional social movement full-time staff who move in and out of government, private agencies, foundations, or universities. The most important change is that the new funding has relieved the professional leadership from depending on the membership base for financial support.

The mass media have significantly aided the ability of the leaders to manipulate both the funding sources and the membership base. Leaders use the media to attract members, gather support for the organization's goals, and to try to influence elites. Thus, the size of the organization and its activity may depend more on media coverage than on the actual size and intensity of membership support or the nature of the grievances. Furthermore, because television can involve large numbers of people vicariously, news coverage can create a large pool of support. Many large organizations depend on this kind of membership, involving mailed contributions and almost no other membership requirements.

The changes in funding allow the leaders to become full time actors with a large proportion of their resources coming from outside the group that the

movement claims to represent. Despite the fact that the actual membership may be very small or even nonexistent, the leaders will claim that they are "speaking" for a particular constituency when in fact they make all the decisions with little or no participation by whatever membership does exist. The authors claim that the growth of these funded social movements "deflects the importance of Olson's argument, since . . . individual citizen participation may be unimportant to movement vitality."[71]

Dependence on the funding sources raises other kinds of problems for the social reform group leaders. Funding sources are generally considered to be unstable, and certainly one could not expect the establishment sources to fund radical social reform groups to any significant extent. McCarthy and Zald call donors "contributing beneficiaries;" the distinction would be that they participate in the group by paying for the collective good, but they do not consume the collective good.[72] The task of the leaders is to induce these people to contribute. Although the resources are available for those who give, these are marginal expenditures; the potential donors have other choices and demands, and will only contribute so much. And because these donors, by definition, do not experience the grievances that the members of the group feel, their commitment to the group is more tenuous. The relationship, therefore, between the leaders of the group and the contributing beneficiaries is an uneasy one. Because donors make resource available, the leaders are induced to serve and lead; they receive selective benefits as part of a privileged group within the larger group. On the other hand, the leaders are constrained by their reliance on outside support. Somehow, they have to convince contributing beneficiaries that their cause is worthy.

Mobilizing resources may be a one-time event for a social reform group; the goals may be fulfilled by a massive demonstration, or by an ad, or a petition. But generally speaking, mobilization is a continuous process, often involving

several different stages during the life of an organization. The stages vary with the environmental conditions within which the organization operates. Quite often, then, the effectiveness of a social reform group depends upon its staying power, its ability to continue its efforts through the ups and downs of its political struggles. Michael Lipsky, in writing about the use of protest tactics by relatively powerless groups, addresses this problem.[73] He points out that although these groups can use protest tactics to enlist the resources of third parties to enhance their bargaining position, the groups often lack the basic resources upon which effective participation in the political process depends. The groups lack the necessary staff, experience, and expertise with which to press forward their positions. Consequently, the "target groups" can placate the protest groups with largely symbolic rewards.[74]

McCarthy and Zald do not deal with the issue of staying power. Leaders of funded social reform groups may be able to dispense with a stronger membership base, but for how long and for what purposes? Does the outside funding only provide for start-up activities, and is the group then left relatively powerless? If this is the case, the ready availability of outside money may actually hinder the growth of strongly organized social reform groups by stimulating the ephemera growth of false movements. At the conclusion of their paper, McCarthy and Zald seem to recognize this possibility; they point out that there is the distinct possibility that the leaders of social movements may actually manufacture grievances to fit available funding sources and personnel.

The use of the legal system, in mobilizing and using resources, can be analyzed in stages. The first stage involves the problem of obtaining access to the system. In the examples of this paper, access was obtained by the opening up of the legal system, particularly the federal judiciary, and the availability of subsidized legal talent eager to serve the groups. With these resources,

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social reform groups are then able to get a responsive hearing. The next stage is the rule change itself. A favorable court decision, statute, or administrative decision, by itself, constitutes a resource for the group. The favorable decision lends legitimacy to the demands of the group. This, in turn, stimulates some voluntary compliance and helps the groups to solicit additional resources. The Supreme Court's decision in Brown v. Board of Education, at the minimum, had this kind of effect for the civil rights groups; there was immediate voluntary compliance in many border school districts and the decision stimulated a vast amount of northern liberal support.

At this point in the mobilization process, social reform groups resemble McCarthy and Zald's "funded social movement organizations." The resources that have enabled the social reform groups to progress to the point of accomplishing a favorable change in a legal rule have been primarily outside resources: the openness of the legal system, subsidized lawyers, and the rule change itself. To get to this point, many social reform groups have not had to rely on mass membership support.

The next stage involves implementation or enforcement of the legal rule. In many situations, enforcement or implementation is practically automatic, and, thus, does not present a distinct problem to the social reform group. This occurs quite often when the legal system is used to provide selective goods for the members. For example, the National Welfare Rights Organizations used litigation and the threat of litigation to obtain cash benefits to individuals; once agreement was reached, the money was paid promptly. When the criminal law is used defensively to ward off attacks on group members and free them from jail, enforcement is almost always automatic. Implementation may also not be a problem when the legal system is used to provide a collective good, but that collective good is subsidiary to other goals of the social reform group.

For example, an environmental group may bring an action to stop the bulldozer to gain time for negotiation and to mobilize additional outside resources.[75] If the court decision is a temporary injunction, it is virtually self-executing and there is usually no problem of enforcement. On the other hand, if negotiations drag on, the developers may seek modifications of the court order or the order itself may allow certain kinds of development to proceed under specified conditions. When the litigation begins to take on a continuing character, with further participation by the parties, and requests for modifications and other changes, then the problem of enforcement and staying power will emerge. This would be analogous to the Maritime pollution and Trans-Alaskan Pipeline examples. Implementation, in those cases, required continuous inputs by the social reform groups.

It is with the affirmative use of litigation, when the legal system is asked to provide collective goods, that the implementation stage becomes most critical. Changes in desegregation laws, voter registration requirements, abortion laws, and welfare benefits are collective goods. The potential beneficiary class is large. According to Olson, it is not rational economically for any one member to contribute to the reform effort since the contribution will not affect the result and the member can enjoy the collective good anyway. In the examples that were given in this paper to illustrate the four kinds of enforcement problems, the social reform groups were able to mobilize outside resources for the first two stages, but failed in the implementation stage.

Although these case studies were chosen for illustrative purposes only, they raise serious questions about the efficacy of social reform groups in the use of the legal system, at least for affirmative results. The most obvious problem would appear to be lack of staying power. In McCarthy and Zald's terms, outside resources come from "contributing beneficiaries" -- that is, people who

participate in the group by contributing money, and sometimes services, but who do not consume the collective good. Contributing beneficiaries have a tenuous relationship with the group. They experience the grievances of the membership only vicariously, and there is competition from other organizations and interests for their attention and money. It may be that contributing beneficiaries do not appreciate the problems of implementation; it may be that money of this kind is only forthcoming in sudden bursts at great dramatic moments, such as a Supreme Court victory. Whatever the reason, there is a question whether existing sources of outside resources are sufficient for the long, drawn-out, undramatic tasks of implementation.

It is also possible that at least in some situations, legal victories may not be representative of the real grievances of the membership. The use of outside resources lessens the dependency of the leadership on the membership and makes the leaders more responsive to the funding source. In some social reform groups, as McCarthy and Zald point out, it would be impossible for the leaders to find out what the membership wants since the membership base is either non-existent in fact, or extremely amorphous. A real danger, then, of the funded social movement organization is that the leaders manufacture issues to sell to contributing beneficiaries. The leaders, as a privileged group, receive selective benefits. There is some scattered evidence the use of legal system by social reform groups raises an analogous problem, namely, that the availability of subsidized legal talent results in legal battles that are not of great salience to the members. For example, Louis Lomax claims that one of the reasons that the NAACP Legal Defense Fund had so much trouble in getting southern blacks to join in school desegregation lawsuits was that for most blacks in the South, attending white schools was a low priority. They had much more pressing needs. Lomax charges that the NAACP top leadership and their lawyers

were seriously out of touch with the wishes of the potential membership. According to Lomax, the NAACP is a hierarchical organization and there is not much communication between the top leadership and the grass roots. Even if the social reform group has active members, it may not put a high priority on litigation. The group may be willing to join in lawsuits to accept whatever gains accrue, but not be involved to any great extent. The lawsuit would largely be the creation of the subsidized lawyers. A certain amount of entrepreneurship has characterized civil rights, poverty, and public interest lawyers. It is relatively easy and inexpensive for a lawyer to take a class action test case, and the potential publicity gains to the lawyer and the leaders of the social reform group may be great. The lawyers are practicing "real law" (e.g., appellate court litigation, intricate negotiations with high officials) and it is virtually a free resource to the group leadership. To the extent that the membership of a group is not involved or the legal victories are not a high priority item for them, one would not expect the members to contribute to enjoy a collective good. On the other hand, it may be unimportant that the goals of the litigation lack salience to the members, because even if the legal battles did reflect real grievances, the free rider problem may prevent effective mass support anyway.

Obviously much more empirical evidence needs to be gathered and theoretical work done on the efficacy of social reform groups than is presented in this paper. However, the case examples do point up a real problem of staying power that has been identified by Lipsky in an analogous context. The litigation experience presented here casts doubt on the McCarthy-Zald theory of funded social movement organizations if that theory is intended to imply that social reform groups, through outside resources, are able to overcome the free rider problem and become effective in the political process. Outside resources have

made groups more effective than previously; this is certainly true of the use of the legal system. To this extent, the free rider problem is lessened. But, in many important examples, social reform groups are still not able to overcome their weaknesses, as analyzed by Olson. In terms of the pluralism model, the availability of the legal system has given social reform groups a hearing and increased somewhat their effectiveness. The legal system has only been used most effectively as part of the group's on-going political struggle. What the case examples on enforcement indicate is that social reform groups cannot avoid the political process by relying on the courts.

FOOTNOTES

1. John D. McCarthy and Mayer N. Zald, The Trend of Social Movements in America: Professionalization and Resouce Mobilization (General Learning Press, Morristown, N.J., 1973).
2. Theodore J. Lowi, The Politics of Disorder (Basic Books, New York, 1971).
3. See William E. Connolly (ed.), The Bias of Pluralism (Aldine - Atherton, Chicago; N.Y., 1969).
4. Mancur Olson, Jr., The Logic of Collective Action--Public Goods and the Theory of Groups (Harvard University Press, Cambridge, Mass., 1965).
5. Clement Vose, Constitutional Change (Lexington Books, Lexington, Mass., 1972).
6. See Robert McCloskey, The Modern Supreme Court (1972), p. 345.
7. NAACP v. Button, 371 U.S. 415 (1963).
8. 347 U.S. 483 (1954).
9. See McCloskey, supra, pp. 338-341.
10. 369 U.S. 186 (1962).
11. See McCloskey, supra, p. 342; Powell v. McCormack, 395 U.S. 486 (1969).
12. See, e.g., Sierra Club v. Morton, 405 U.S. 727 (1972).
13. NAACP v. Alabama, 357 U.S. 449 (1958); Griswold v. Connecticut, 381 U.S. 479 (1965) (doctor has standing to assert constitutional rights of patients); Dombrowski v. Pfister, 380 U.S. 479 (1965). See Edgar Cahn, "Law in the Consumer Perspective," 112 U. Pa. L. Rev. 1 (1963).
14. Dombrowski v. Pfister, 380 U.S. 479 (1965); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Damico v. California, 389 U.S. 416 (1968). In a similar vein, the Court relaxed the doctrine of mootness. Gray v. Sanders, 372 U.S. 368 (1962); Ginsberg v. New York, 390 U.S. 629 (1968).

15. See Harper v. Virginia Board of Elections, 383 U.S. 663, 667. See also Reynolds v. Sims, 377 U.S. 533 (1964).

16. In re Gault, 387 U.S. 1 (1967).

17. See Greene v. McElroy, 360 U.S. 474 (1959); Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969); Shelton v. Tucker, 364 U.S. 479 (1960); Goldberg v. Kelly, 397 U.S. 254 (1970).

18. See generally, William Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 Harvard Law Review 1439 (1968).

19. See Morey v. Doud, 354 U.S. 457, 471 (Black, J., dissenting).

20. See, e.g., Edwards v. South Carolina, 372 U.S. 229 (1963); NAACP v. Alabama, 357 U.S. 449 (1958); N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

21. Laurent B. Frantz, "The First Amendment in the Balance," 71 Yale L.J. 1424 (1962).

22. See, e.g., Engel v. Vitale, 370 U.S. 421 (1962); Sherbert v. Jenner, 374 U.S. 398 (1963).

23. Most of the literature on the recruitment of lawyers into various social reform group activities is fairly general and popular. See Morlis James, The People's Lawyer (Holt, Rhinehard & Winston, N.Y., 1973), Introduction; Philip C. Kazanjian, "Preparing for the Law: A Look at the New Breed," 17 Student Law Journal, No. 7 (April 1972); Wendy Moonan & Tom Goldstein, "The New Lawyer" in the New Professionals (Simon & Schuster, N.Y., 1972); Peter Vanderwicken, "The Angry Young Lawyers," Fortune, September, 1971.

24. 354 F.2d 608 (2d Cir. 1965).

25. For a discussion of the range of tactics, including litigation, used by

various social reform groups in one community, see Kenneth E. McNeil, Citizens as Brokers: Cooptation in an Urban Setting (unpublished Ph.D. dissertation, 1973, Vanderbilt University).

26. The data for the Black Panther Party was obtained from the following sources:

Allen, Robert L., Black Awakening in Capitalist America (Doubleday, New York, 1970).

The Black Panther, Intercommunal News Service, Black Panther Party, Publishers, Oakland, California.

Blackburn, Sara, White Justice (Harper, New York, 1971).

Cleaver, Eldridge, Post-Prison Writings and Speeches (Random House, New York, 1969).

Foner, Phillip S., The Black Panther Speaks (J. B. Lippincott Company, Philadelphia, 1970).

Lockwood, Lee, Conversations With Eldridge Cleaver (Dell, New York, 1970).

Major, Reginald, The Panther Is A Black Cat (William Morrow and Company, New York, 1971).

Marine, Gene, The Black Panthers (New American Library, 1969).

Newton, Huey P., To Die For The People (Random House, New York, 1972); Revolutionary Suicide (Harcourt Brace Jovanovich, Inc., New York, 1973).

Seale, Bobby, Seize The Time (Random House, New York, 1968).

Skolnick, Jerome, The Politics of Protest (Simon and Schuster, New York, 1969).

U.S. Congress, Committee on Internal Security, Black Panther Party Hearings, 1970.

27. Foner, supra, p. 258.

28. See Otto Kirchheimer, Political Justice (Princeton Univ. Press 1961).

29. Theodore L. Becker (ed.), Political Trials (Bobbs-Merrill Company, Inc., 1971), XI-XVI.

29. There are many examples of this kind of a political trial. See Kirchheimer, supra, ch. 6, and descriptions of the trial of Reies Lopez Tijerina and LeRoi Jones in Becker, supra. Kirchheimer says that according to Lenin, "The supreme rule of a political defense is propagation of the doctrine rather than the fate of the individual defendant." Ibid., p. 245.

30. Marine, supra, p. 43.

31. The data on SNCC are from the following sources:

Carmichael, Stokely, and Hamilton, Charles, Black Power, (Vintage, New York, 1967).

Carmichael, Stokely, "Who Is Qualified?" New Republic (Jan. 8, 1966), p. 21.

Cohen and Hale, The New Student Left: An Anthology (Beacon, Boston, 1966).

Dellinger, Dave, "The Future of Nonviolence," Studies on the Left, Vol. 5, No. 1, 1965, pp. 90-93.

Edwards, Harry, Black Students (The Free Press, New York, 1970).

Forman, James, The Making of Black Revolutionaries (Macmillan, New York, 1972).

Forman, James, Sammy Younge, Jr. (Grove, New York, 1968).

Grant, Joanne, Black Protest (Fawcett, New York, 1968).

Jacobs, Paul and Landau, Saul, The New Radicals (Penguin, England, 1966).

Lewis, Anthony, Portrait of a Decade -- The Second American Revolution (Random House, New York, 1964).

Skolnick, Jerome, The Politics of Protest, Report to The National Commission on the Causes and Prevention of Violence (Ballantine, New York, 1969).

Waskow, Arthur I., From Race Riot to Sit-In (Doubleday, New York, 1966).

Zinn, Howard, SNCC -- The New Abolitionists (Beacon, Boston, 1964).

32. See sources, note 25.

33. Marine, supra, note 25, p. 43.

34. The data on the National Welfare Rights Organization are from the following sources: Frances Fox Piven and Richard H. Cloward, Regulating the Poor (Pantheon Books, N.Y., 1971); Cloward & Piven, "A Strategy to End Poverty," The Nation (May 2, 1966); Cloward & Elwan, "Advocacy in the Ghetto," Transaction (December 1966); NOW! National Welfare Rights Bulletin, Feb. 9, 1968; Robert Nelson gathered much data from newspaper accounts in New York City, Boston, and Newark, as well as personal interviews with welfare rights leaders and legal services lawyers. There is a vast literature in legal periodicals dealing with welfare rights.

35. See, for example, Irene Lurie, "Legislative, Administrative, and Judicial Changes in the AFDC Program, 1967-71," in Studies in Public Welfare, Paper No. 5, Part II, Issues in Inter-Governmental Relations, Sub-committee on Fiscal Policy, Joint Economic Committee of Congress (U.S. Government Printing Office, Washington, D.C., 1973).

36. For accounts of proposed welfare reform, see Joel F. Handler, Reforming the Poor (Basic Books, N.Y., 1972), c. 6; Daniel P. Moynihan, The

Politics of a Guaranteed Income (Vintage Books, N.Y., 1973).

37. For a discussion of the Montgomery bus boycott, see Anthony Oberschall, Social Conflict and Social Movements (Prentice-Hall, Inc., Englewood Cliffs, N.J., 1973), pp. 126-27; 267-68.

38. McNeil, supra, note 25 makes these points in his case study.

39. In most instances, the defendants cannot afford legal fees and the lawyers have to work at subsistence wages. These are not legal service, public defender, or foundation-supported lawyers. The cases are so demanding and the defense lawyers so short-handed, that in many instances, the lawyer's private practice withers away.

40. Oberschall, supra, p. 206.

41. Louis E. Lomax, The Negro Revolt (Harper & Row, N.Y., 1971), pp. 83-86.

42. Anthony Lewis and the New York Times, Portrait of a Decade (Random House, N.Y., 1964), p. 5.

43. Quoted in Lomax, supra, p. 85.

44. Lewis, supra, c. 3.

45. See Alexander M. Bickel, The Least Dangerous Branch (Bobbs-Merrill Co., Inc., Indianapolis, Ind., 1962), pp. 255-66.

46. U.S. CIvil Rights Commission, 1963 Staff Report, Public Education, December 1963, pp. 1-57.

47. U.S. Civil Rights Commission, Education, Vol. 11, 1961, p. 177-78.

48. Charles E. Silberman, Crisis in Black and White (Vintage Books, N.Y., 1964), p. 289.

49. Lomax, supra note 40, p. 125.

50. Oberschall, supra note 36, p. 223.

51. Silberman, supra note 48, p. 142.

52. Oberschall, supra note 36, p. 230.

53. See Political Participation -- A Report of the United States Commission on Civil Rights (1968), p. 1-55.

54. This problem is discussed at length in Joel F. Handler, "Controlling Official Behavior in Welfare Administration," 54 California Law Review 479 (1966) and The Coercive Social Worker (Rand McNally, Chicago, Ill., 1973), chs., 1, 7.

55. "The New Public Interest Lawyers," 79 Yale Law Journal 1056, 1069-79 (1970).

56. The materials on the abortion controversy are from the following sources: Lawrence Lader, Abortion (Beacon Press, Boston, 1966); Abortion II -- Making the Revolution (Beacon Press, Boston, 1973); Daniel Callahan, Abortion: Law, Choice, and Morality (MacMillan, N.Y., 1970); Planned Parenthood Federation of America, Family Planning, Population Reporter -- A Review of State Laws and Policies, Vol. 2, No. 3 (Washington, D.C., 1973); Bea Blair, "Abortion: Can We Lose Our Right to Choose?" MS., Oct. 1973, pp. 92-95; Jimmy Kimmey, "How Abortion Laws Happen," MS., April 1973, pp. 118-20; Materials prepared for Workshop on Abortion and Reproduction Control, Center for Law and Social Policy, Washington, D.C., June 9, 1973. In addition information was obtained from interviews with lawyers active in the abortion controversy.

57. The D.C. law permitted abortion to save a woman's life or health.

58. Roe v. Wade, 410 U.S. 113 (1972).

59. See Richard Leone, "Public Interest Advocacy and the Regulatory Process," The Annals, Vol. 400, (March 1972), pp. 46-47, 52.

60. This account is taken from Peter E. Sitkin, "Welfare Law: Narrowing the Gap Between Congressional Policy and Local Practice," in Studies in Public Welfare, Paper No. 5 (Part 2), Issues in Welfare Administration: Intergovernmental Relationships, U.S. Joint Economic Committee, Subcommittee on Fiscal Policy (U.S. Government Printing Office, Washington, 1973), p. 36.

61. For an analysis of this statute, see Robert L. Rabin, "Implementation of the Cost-of-Living Adjustment for AFDC Recipients: A Case Study in Welfare Administration," 118 U. of Pa. L. Rev. 1143 (1970).

62. Rosado v. Wyman, 397 U.S. 397 (1970).

63. Mancur Olson, Jr., The Logic of Collective Action--Public Goods and the Theory of Groups, (Harvard University Press, Cambridge, Mass., 1965).

64. Even with small groups, Olson argues that the collective goods will not be supplied at an optimal level because the members of the group will not provide enough of the good to satisfy their common interests. This happens because the individual member who pays for a collective good gets only part of the benefit and will therefore discontinue paying before the optimal amount of the good is reached for all of the members. And, the larger the group, the more likely the optimal amount will not be reached.

In addition, with small groups, Olson maintains that there is a tendency for "exploitation" of the great by the few. The largest member of a small group provides the collective good at his own expense. The smaller member gets a smaller amount of the benefit of the collective good and therefore has less incentive to provide anything

more for the collective good. Furthermore, once the smaller member gets the amount of the collective good that he gets free from the largest member, he has more than he would have purchased himself, and therefore has no incentive to pay anything for the collective good. Many small groups do suffer from an arbitrary sharing of burdens of providing collective goods and suboptimal amounts of such goods. There are situations where small groups can equalize burdens and provide optimal amounts of collective good through institutional or procedural devices.

65. The only exception, he would argue, is where there are very unequal degrees of interest in the group; under those circumstances, collective goods may be provided.

66. Olson stresses throughout that he is talking about economic organizations. He thinks that his theory should apply as long as rational individuals are interested in common goals. He does not think that the theory is useful in describing the activities of religious or philanthropic groups, nor does he think the theory useful with groups "with a low degree of rationality -- that is, working for lost causes." Economists would think it pointless to make ineffective sacrifices.

67. Theodore Lowi, The Politics of Disorder (Basic Books, New York, 1971); The End of Liberalism.

68. John D. McCarthy and Mayer N. Zald, The Trend of Social Movements in America: Professionalization and Resource Mobilization (General Learning Press, Morristown, N.J., 1973).

69. See, e.g., Stanley Milgrim and Hans Toch, "Collective Behavior: Crowds and Social Movements," in Handbook of Social Psychology, Vol. 4,

p. 590, where they define elements of social movements as people who are faced with a social deficit, experience it as such, view it as remediable, and feel the need to become personally involved in the achievement of the solution. Of course, many steps or conditions have to be met before a group fits form. See Neil Smelser, Theory of Collective Behavior (Free Press, N.Y., 1962). For a critical survey of research on social reform groups, see Jack M. Weller and E. L. Quarantelli, "Neglected Characteristics of Collective Behavior," 79 American Journal of Sociology No. 3, p. 665 (1973).

70. McCarthy and Zald argue that survey data do not show that with the increasing size of the middle class there is a corresponding increase in social and political involvement or participation by the middle class. Nor does analysis withstand the argument that where there is increased leisure time, there is greater participation in social reform groups. People in higher status occupations tend to work longer hours. In addition, the increase in per capita income without a corresponding increase in leisure time, means that there is a tendency to spend money on what the authors call "high-yield" leisure time activities rather than "low-yield" activities. They think that social reform activities are low-yield and therefore would predict a declining allocation of time to these activities. They conclude that the available evidence shows that the affluent society has not created a large pool of leisured middle class people who are participants.

71. McCarthy and Zald, supra, p. 22, n. 14.

72. Olson would classify this as a charitable impulse and outside of his analysis.

73. Michael Lipsky, "Protest As a Political Resource," 62 American Political Science Review 1144 (1968).

74. In addition to Lipsky, see Murray Edelman, Symbolic Uses of Politics (Univ. of Ill. Press, Urbana, Ill., 1964).

75. This is a collective good, since a wilderness area or pure stream can be enjoyed not only by non-contributing members, but also by the public at large. Therefore, the environmental group does have a free rider problem to overcome before it can get to court.